

# Key Considerations in School District Real Estate Transactions

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# Program Topics

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- Preliminary steps when selling school district property.
- Methods for selling school district property.
- Important provisions to address in real estate documents.
- Key issues when purchasing property for school district purposes, including for future development.

# Preliminary Steps When Selling School District Property

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- Determine whether selling or leasing the property is the best option.
- Review the original deed(s) and/or obtain a letter report from a title company to verify that the school district holds fee title. For instance, the original deed(s) may contain reversionary language.
- Determine whether elector approval is required and build-in enough time to obtain elector approval, if necessary. Alternatively, consider using a contingency for elector approval.
- Determine who will negotiate on behalf of the Board and sign real estate documents.
- Consider the various methods for selling school district property and which method(s) make the most sense under the circumstances.
- Review current policies to make sure that a specific method for selling real property has not been previously adopted.

# Elector Approval Requirements

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- For common and union high school districts, elector approval is not required for:
  - Selling school district real property that is no longer needed for school purposes
  - Accepting donated land
  - Entering into agreements, including leases, with another governmental body for the purchase, operation and maintenance of land, buildings and equipment for educational purposes
- For common and union high school districts, elector approval is generally required for:
  - Acquiring real estate and improvements for school district purposes
    - Approval of a borrowing resolution at a referendum election may be sufficient
  - Designating sites for school district buildings and providing for the construction of suitable buildings
  - Leasing suitable buildings for a period not exceeding 20 years
  - Exercising an option to purchase real estate
- In unified school districts, the school board has the powers of both the school board and the annual meeting in a common school district.

# Methods to Sell School District Property

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- School districts are not required to follow a competitive bidding process.
- School districts often use one or more of the following methods to sell property:
  - Implement a request for proposal process.
  - List the property with a real estate broker.
  - Negotiate with one or more specific potential buyers who have shown interest in the property.
- Each method for selling school district real property offers advantages and disadvantages.
  - Relevant considerations include: market conditions; real estate commissions; potential costs and cost savings; generating competition; and the timing and complexity of the process.

# Real Estate Documents – Selling Property

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- Be cautious in completing documents related to the condition of the property:
  - Generally, school districts do not have a legal obligation to complete a real estate condition report.
  - The obligation of a seller to provide a real estate condition report applies to the sale of real estate involving one to four dwelling units and the sale of property that does not include any buildings. It also applies to the sale of a condominium unit or time-share property. However, a buyer may waive, in writing, the right to receive the report.
  - There are exceptions to the completion of the real estate condition report for real estate that has never been inhabited, for persons that are court appointed and have never occupied the property (e.g. personal representatives or trustees), as well as for transfers of real estate that are exempt from the real estate transfer fee.
  - Although completing a real estate condition report may assist the broker with meeting his or her obligations as a broker, it may not be in the best interest of the seller to complete the document.
  - A seller who completes the real estate condition report may be exposing itself to risks.
  - There may not be a person who possesses the necessary historical information and documents regarding the property in order to fully and accurately complete the report.
  - In addition, with old buildings that are no longer in use or have limited use, there are often legacy issues of which the owner may or may not be aware.

# Real Estate Documents – Selling Property

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- Commercial Listing Contract (Listing with a Broker)
  - Consider modifying or removing certain language related to representations about the property.
  - The standard document includes language that the seller will complete a disclosure report to the best of the seller's knowledge and authorizes the broker to distribute the report.
  - This language likely relates to the broker's duty to inspect the real estate and make inquiries of the seller on the condition of the structure, mechanical systems and other relevant aspects of the property.
  - There is additional language regarding the seller representing that it has no notice or knowledge of Defects affecting the Property other than as noted on the disclosure report.
    - "Defect" is defined as "a condition that would have a significant adverse effect on the value of the Property; that would significantly impair the health or safety of future occupants of the Property; or that if not repaired, removed or replaced would significantly shorten or adversely affect the expected normal life of the premises."
  - The standard document also includes language regarding seller representations on the current zoning and related matters.

# Real Estate Documents – Selling Property

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- Commercial Offer to Purchase and Vacant Land Offer to Purchase Forms
  - These standard forms include language stating that the seller represents to the buyer that as of the date of acceptance the seller has no notice or knowledge of conditions affecting the property or transaction other than those identified in the real estate condition report.
  - “Conditions Affecting the Property or Transaction” includes multiple property-related conditions, as well as a catch-all provision.
  - Watch for language added by the buyer or broker in the Offer to Purchase, addenda, and other attachments that could be interpreted as the seller making representations concerning the condition of the property.



# Selling “As is, Where is”

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- A school district may be selling the property in an “as is, where is” condition:
  - It is incumbent upon the buyer to conduct its own due diligence.
  - Ensure that certain language in the standard Offer to Purchase form is deleted related to the condition of the property.
  - Carefully review addenda and documents incorporated into the Offer to Purchase by the buyer, if any.
  - The school district should not conceal adverse facts within its knowledge that are not readily discoverable by the buyer. A school district could provide the most recent facility study for information purposes only and make clear that the buyer is not relying upon any representations contained therein.
- There are alternatives to selling the property “as is, where is” that represent a middle ground approach:
  - Limit the real estate condition report to the knowledge of a specific person, if possible.
  - Use the standard real estate condition report, which provides language that the seller is not “aware,” specifically defined as “notice or knowledge” of the condition, as opposed to making broader representations concerning the overall condition of the property.

# Purchasing Property for School Purposes

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- Earnest money
  - In most transactions, the earnest money is applied to the purchase price if the transaction closes and is refundable to the school district if the purchase fails because contingencies are not satisfied.
  - The purchase agreement may provide for a certain initial earnest money payment that will be returned to the school district if it does not satisfy one or more contingencies. An additional earnest money payment may be due at the time the school district satisfies those contingencies.
- Obtain representations and warranties from the seller regarding the condition of the property, if possible.
  - If the seller is selling the property “as-is” and is not making any representations or warranties, the school district should have a broad due diligence provision with refundable earnest money.
- Review the title work early in the process to confirm that there are no major issues that would impact the school district’s proposed plans.
- Consider obtaining a detailed survey (e.g. ALTA Survey)
- Conduct broad due diligence to ensure that the proposed project will meet the needs of the school district:
  - Zoning; document review; environmental analysis and testing; inspections and testing; utilities; land use and governmental approvals.

# Real Estate Documents – Purchasing Property

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- Contingencies in the standard Offer to Purchase form:
  - Property use contingencies
    - Zoning; easements and restrictions; approvals; access to property
  - Land use approvals/permits
  - Map/survey of the property
  - Document review
  - Environmental evaluation
  - Inspections and testing
  - Financing commitment
  - Appraisal

# Real Estate Documents – Purchasing Property

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- Consider adding provisions in an addendum:
  - Sharing of documents, such as contracts, environmental reports, and title reports
  - Broad due diligence provision, perhaps with a small non-refundable option payment
  - Government approval contingency
  - Contingency for creation of a separate parcel, if necessary
  - Elector approval contingency
  - Referendum approval contingency
  - Title work provision with process to review and object to title issues

# Thank You

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Questions?

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